United Nations AT/DEC/1147

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1147

Case No. 1246: AGUADO BOMBIN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 26 February 2002, Rosa Aguado Bombín, a staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

"*Section II: Pleas*

1. That the [T]ribunal determine that the Secretary-General did have discretion to place the Applicant in a higher step than that specified in ... [staff rule] 103.9(a).

2. That the [T]ribunal determine that under the circumstances of the present case, the Secretary-General should have placed the Applicant in the highest step of the P-3 level.

3. That the Tribunal [award] US $1,000 in costs."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2002;

Whereas the Respondent filed his Answer on 17 June 2002;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Office at Vienna (UNOV), Division on Narcotic Drugs, on a three-month project personnel appointment as a Scientific

Expert, at the L-3, step VI level, on 1 May 1988. Her appointment was extended numerous times until 31 August 1995, when the project post she had been placed against was discontinued. On 1 September 1995, the Applicant was granted a four-month fixed-term appointment, against a regular budget post, at the P-2, step XII level, which appointment was extended several times. On 10 April 1996, the Applicant successfully applied to the P-2 post she was encumbering, and, effective 1 September 1996, was granted a two-year fixed-term appointment, which was subsequently extended by a further period of three years. On 1 December 2000, the Applicant was promoted to the P-3 level. She was granted step VI.

On 11 December 2000, the Applicant wrote to the Director, Division of Administrative and Common Services, UNOV, requesting a review of the step granted to her upon her promotion and, on 3 January 2001, she was informed that the step she was granted "was determined accurately in line with the applicable rules and regulations".

On 22 January 2001, the Applicant requested the Secretary-General to review the administrative decision to appoint her to a P-3 level post at step VI and, on 25 March, the Applicant was informed that the original decision would be maintained.

On 25 April 2001, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 27 September 2001. Its findings and conclusion read, in part, as follows:

> "**Findings**
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> ...
>
> 12. While the Panel is certainly sympathetic of the circumstances that the Appellant has had to face in her [United Nations] career, it is, however, of the opinion that where the Respondent had discretion, it was generally exercised to minimize negative impact on the Appellant. When the Appellant's project post was discontinued, for example, the Respondent offered to the Appellant, exceptionally, a more stable, regular budget post ... When the Appellant was placed against the P-2 post, the Respondent used [his] discretion to place her at step XII to minimize financial losses she would incur incident to her having to relinquish a salary at the L-3 level. After clearing the relevant Appointment and Promotion bodies, the Appellant was given a two-year fixed-term appointment, which was extended for a period of three years in September 1998 (the longest extension she had received under the 200 series of the Staff Rules was for one year).
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> 13. While there are indications that the Respondent could have handled the employment of the Appellant more transparently ... the Panel notes that the Appellant agreed of her own free will in September 1995 to accept the

offer of appointment to the P-2 regular budget post, and to be bound by the provisions of the 100 series of the Staff Rules. The Panel therefore has difficulty concluding that the Respondent's determination of the Appellant's position on the salary scale as step VI of the P-3 level is an abuse of discretion.

Conclusion

14. For the reasons cited above, the Panel rejects the claim of the Appellant to adjust the step granted upon her promotion from the P-2 level to the P-3 level."

On 13 December 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB's conclusion and had decided to take no further action on her appeal.

On 26 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Secretary-General had discretion in implementing staff rule 109.3(a). The JAB erred in deciding to the contrary.

2. Although the Secretary-General has no discretion to assign a staff member on promotion to a lower step than that provided for by staff rule 103.9(a), it cannot be true that he has no discretion to make favourable assignment in an appropriate case.

3. In view of the Applicant's employment history, it would have been entirely appropriate to assign her to a higher step.

Whereas the Respondent's principal contentions are:

1. The Applicant was placed at the correct step upon her promotion.

2. The Applicant did not have a legal expectancy of a higher step upon promotion.

The Tribunal, having deliberated from 30 October to 17 November 2003, now pronounces the following Judgement:

I. This Application arises out of a decision by the Respondent to promote the Applicant from the P-2, step XII level to the P-3, step VI level. Although the Applicant does not dispute the promotion itself, she asserts that the granting of a step

VI was improper, because, after thirteen years of service with the United Nations she was "at precisely the same level and step she was first appointed".

II. The Applicant began her employment with the United Nations as a Scientific Expert in the United Nations Division on Narcotic Drugs in Vienna, on 1 May 1988 at the L-3, step VI level. Initially, she received a short-term project appointment under the 200 series of the Staff Regulations and Rules, which was subsequently extended numerous times on various fixed-term appointments, until 31 August 1995, when the project post against which she had been placed was discontinued.

When the Applicant's project post was discontinued, the Respondent offered to the Applicant, on an exceptional basis, a more stable, regular budget post, generally earmarked for successful candidates of the national competitive examinations, in order to prevent the Applicant from having to separate from the Organization. Thus, on 1 September 1995, the Applicant was placed on a four-month, fixed-term appointment under the 100 series of the Staff Regulations and Rules, at the P-2 step XII level. (At the time of her appointment to the P-2 post, the Respondent had the authority to make such discretionary appointments. Such authority no longer exists.) The Respondent also exercised his discretion in the appointment process by placing her at the highest step in the level, step XII, in an effort to minimize the financial loss the Applicant had suffered as a result of the discontinuation of her project appointment at the L-3 level. Thereafter, upon consideration by the relevant appointment and promotion bodies, the Applicant was given a two-year fixed-term appointment, which was extended for a period of three years in September 1988. The longest extension the Applicant had received under the 200 series post she held was a one year extension.

On 1 December 2000, the Applicant was promoted from the P-2 step XII level to the P-3 step VI level.

III. The Applicant challenges the decision to place her at step VI of the P-3 level, asserting that, while "the Secretary-General has no discretion to assign a staff member on promotion to a lower step than that provided for by staff rule 103.9 (a), it cannot be true that he has no discretion to make a favourable assignment in an appropriate case." She asks the Tribunal to determine that the Secretary-General did have such discretion and that, under the circumstances, the Secretary-General should have placed the Applicant in the highest step of the P-3 level.

IV. The Applicant's characterization of the issue, however, is improper. The issue at hand is not whether the Secretary-General had discretion to place her at a higher step, but, rather, whether the Applicant received the appropriate step increase to which she was entitled.

Staff rule 103.9 (a) provides:

> "(a) On promotion, a staff member *shall* be placed at the lowest step in the level to which he or she has been promoted that provides an increase in net base salary equal to at least the amount that would have resulted from the granting of two steps at the lower level." (Emphasis added.)

Barring any extraneous factors or considerations, such as, for example, a promise or commitment made to the Applicant that a higher step would be forthcoming, the Applicant has no basis to claim entitlement to a step higher than step VI. The language of rule 103.9 (a) is mandatory, not optional – a staff member "shall" be placed; it does not say "may" or "at a minimum, shall". Contrary to the discretion the Respondent had to place the Applicant against a regular budget post, the Respondent did not have such discretion with respect to promotions. Thus, when the Respondent placed the Applicant at step VI of the P-3 level, following her promotion from her P-2 step XII level, he was following exactly the mandate of staff rule 103.9 (a).

V. The Applicant's reliance on staff rule 104.3 (a), as asserted in her claim before the JAB, is also misplaced. Staff rule 104.3 (a) applies to the re-employment of staff, and is not intended to govern promotions.

VI. Finally, the Applicant has failed to provide any evidence, such as a promise or commitment to place her at a higher step, or any other extenuating circumstances that might warrant a deviation from the plain meaning of the language of staff rule 103.9 (a). While she makes some reference to the fact that, initially, she was offered orally a position at the L-4 level, and that the actual job offer she received in writing was at the L-3 level, this is irrelevant to the issue at hand. At the time, whether or not the Applicant objected, she knowingly accepted the L-3 appointment. Similarly, she accepted the P-2 appointment offered to her in 1995, and then again the promotion granted to her in 2000, knowing full well the salary ramifications. Indeed, while it is unfortunate that the Applicant's salary level is at the same level at which she started when she first joined the United Nations, the Tribunal notes that

her position is significantly improved from that time, as she is now no longer a project personnel, subject to the terms of a particular project or projects, which by their nature generally are of a more temporary basis, but instead holds a regular, budgeted post, that provides her with all the benefits attendant thereto.

VII. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Kevin **Haugh**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary